85-1150

NO. 85-

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SPALLATO, Administrator of the Estate of SONJA M. SPALLATO, Deceased,

Plaintiff-Petitioner

v.

UNITED STATES OF AMERICA,

Defendant-Respondent

SUPPLEMENTAL APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 84-2996

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January 7, 1986

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY SPALLATO, Administrator of the Estate of SONJA M. SPALLATO, deceased,	80 C 1796
Plaintiff,	Chicago, Illinois September 24, 1984 4:45 p.m.
v.	
UNITED STATES OF AMERICA,	
Defendant.	

EXCERPT OF PROCEEDINGS BEFORE
HONORABLE JOHN F. GRADY

TRANSCRIPT ORDERED BY: MR. MICHAEL S. O'CONNELL

APPEARANCES:

For the plaintiff: MR. JOHN C. AMBROSE
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* * * *

(The following proceedings were had in open court:)

THE COURT: I will give you my findings of fact and conclusions of law.

The plaintiff has the burden of proving that it is more probably true than not true that her death was caused in whole or in part by the swine flu injection she was administered. I will analyze the evidence which has been offered for and against that proposition.

First, there is no contention by the plaintiff or anyone else that the swine flu injection directly caused the plaintiff's death. So that theory is not involved in the case. In fact, it is clear from the evidence that the swine flu injection would not itself cause the death and that the only possible relationship between the swine flu injection and the death of the decedent would

be through some indirect series of events triggered by the swine flu injection.

The event that is contended for by plaintiff is Guillain-Barre Syndrome. Specifically, plaintiff contends that Mr. Spallato died as a result of having contracted Guillain-Barre Syndrome from the swine flu injection.

This brings me to my second finding. Mrs. Spallato may have had Guillain-Barre Syndrome. On the other hand, it seems to me at least equally probable that she did not have Guillain-Barre Syndrome. The difficulty is that the diagnosis of Guillain-Barre Syndrome is a difficult medical task. It is not something that can be casually arrived at on the basis of recollections of lay witnesses as to what the patient said.

Now, the evidence that I received from the parents of the decedent and from the husband of the decedent tends in some

degree to support the inference that the plaintiff had a progressive motor weakness of her lower and upper extremities and did not have the sensory deficit that would be more indicative of a diabetic neuropathy. On the other hand, the Court is confronted with the question as to how reliable these reports of these three witnesses are.

Mr. Spallato, when asked by Mr. Ambrose whether Mrs. Spallato complained of numbness, said, "Yes, she did," and then when Mr. Ambrose pursued the matter further said, "Well, no, she did not." It was apparent to me at that point that Mr. Spallato did not really know one way or the other whether his wife, with whom he lived on a day-to-day basis, was complaining of numbness or not. I do not attribute to him any knowing falsification; rather, the problem is in reconstructing what it was that a loved one

said about her condition some four years ago.

I believe the testimony of the parents was credible. I believe that the father and mother of Mrs. Spallato were unusually credible witnesses. But the problem is what significance to attach to their statements.

Now, we have Dr. Allen saying, on the one hand, that unquestionably their testimony, taken together with the other evidence, shows that Mrs. Spallato had Guillain-Barre Syndrome. On the other hand, we have the testimony of the experts called by the defendant that they are unable to make such a diagnosis on the basis of the same data. It is, of course, a medical question and a matter of expert opinion as between the testimony of Dr. Allen, on the one hand, and the testimony of the defense experts, on the other. I find the testimony of the defense experts to be more credible.

Dr. Allen is unquestionably a very well-qualified physician. I found him to be highly intelligent and articulate. On the other hand, I also found him to be deeply involved emotionally in the presentation of plaintiff's case here. For some reason he obviously regards himself as having a personal stake in the outcome of this case, if only from the standpoint of his professional interest in it. I do not mean to imply that he has any pecuniary interest in the matter, but his stance as one who, by his own statement, has the burden of proving something by 51%, his reference to the experts on the other side of the case in unflattering terms, and his use of pejorative descriptions of their testimony, frankly, prevents me from regarding him as a witness whose detachment from the controversy commends the credibility of his testimony.

No such involvement appears on the part of the defense expert witnesses.

Let me stop here just a moment and ask whether everybody is here on the other case.

Ms. Ginsberg, will you look out in the hall and see whether Mr. Solotorovsky and Mr. Samuels or Mr. Purdom and Mr. Samuels are out there. Thank you.

(Brief interruption.)

THE CLERK: 80 C 1796, Spallato v. United States.

THE COURT: All right, thank you, counsel, for your indulgence.

In short, while I think there is a very good possibility that Mrs. Spallato had Guillain-Barre syndrome, I am unable to conclude that there is better than a 50/50 chance that that was the case.

I turn now to finding of fact No. 3. There is no evidence in this record which persuades me that if Mrs. Spallato

did have Guillain-Barre Syndrome it was caused by the swine flu injection. Plaintiff has taken the position throughout the case that that point was conceded by the Government and apparently that it need not be proved in this case. On the other hand, Dr. Allen, I believe, did give the opinion that there was a connection, causal connection, between the shot and the Guillain-Barre. But for the same reasons, I am unable to rely upon Dr. Allen's testimony concerning the existence of Guillain-Barre Syndrome to begin with. I am unable to rely upon that testimony to conclude that it is more likely than not that if GBS was present it was caused by the swine flu injection. Again, there certainly is a good possibility that that would have been the case, but it is equally possible on the state of this record that it was not the case.

Fourthly, if Mrs. Spallato did have GBS, that GBS did not cause the death directly. Just as there is no evidence here and no contention here that the swine flu injection would standing alone cause a death, there is no contention that GBS standing alone would cause a death. Again, the GBS would be an intermediate element in the causal chain.

The causal chain alleged by plaintiff is multifaceted. It did not emerge until I asked some questions of Dr. Allen when he was recalled in rebuttal. There was some question, you will recall, at the conclusion of plaintiff's case as to whether or not Dr. Allen actually had testified to any causal relationship, direct or otherwise, between the GBS and Mrs. Spallato's death. To tie that question down, I questioned him specifically on what his theory was, and he gave us three possible theories.

The first was that GBS caused a cardiac arrhythmia from which Mrs. Spallato died. The second was that the GBS caused some autoimmune reaction which attacked the heart tissue and caused a myocarditis from which Mrs. Spallato died. The third possibility was that GBS caused some kind of antigen-antibody reaction or else some thrombus formation which led to a myocardial infarction, which caused the death.

Dr. Allen acknowledged that each of these possible mechanisms was speculative. His argument in favor of each of them was based largely on the fact that there has been no scientific study to exclude such a possibility. He emphasized the lack of any studies and the presence of data to bear out these theories.

On the other hand, Dr. Lesch testified that arrhythmia would not have

been the cause of death. Ventricular fibrillation would have been the immediate cause of death, and there is no evidence according to Dr. Lesch that GBS has ever caused ventricular fibrillation and, for that matter, even arrhythmia, as I understand it.

As to the possibility that the GBS led to a myocarditis, Dr. Lesch's comment was that the description of the decedent's death does not square with that kind of possible cause. The decedent's death in this case was sudden. Death from a myocarditis would be a gradual process. As to the possibility that the GBS caused a myocardial infarction, Dr. Lesch said that there is no medical evidence to support the proposition that GBS would cause a myocardial infarction.

Dr. Hurst, who testified in deposition, I found to be a credible

witness, and while he did not address himself specifically to the question of the relationship, if any, between GBS and heart trouble, testified that there is no medical evidence to support a causal connection between a swine flu injection and any kind of heart problem. Well, surely Dr. Hurst was well aware of the alleged relationship between the swine flu injection and GBS and undoubtedly would intend to include in his testimony the kind of mechanisms suggested by Dr. Allen as not being supported by any medical data.

In other words, I interpret Dr. Hurst's testimony to mean that there is no evidence that a swine flu injection can cause GBS, which in turn causes myocarditis or an infarct or any other heart problem that might result in death.

What then did cause Mrs. Spallato's death if it was not the swine flu injection and Guillain-Barre Syndrome?

She had myocarditis, and she had a myocardial infarct. The evidence offered by Dr. Ganote and Dr. Lesch was that the myocarditis was secondary to the myocardial infarct. I find that testimony to be far more probable than the reverse proposition advanced by Dr. Allen. The decedent did not die from myocarditis. She died from a myocardial infarct, and there was some myocarditis associated with that infarct but secondary to and caused by the infarct.

What caused the infarct?

Dr. Allen, while not hesitating to attribute Mrs. Spallato's death to the swine flu injection and GBS, apparently believes that there is no possibility that her death was in any way related to her longstanding diabetes. He discounted diabetes as having any significant role in this case. He regarded Mrs. Spallato as being under good control for her

diabetes, and, indeed, that was the lay testimony of Mr. Spallato. However, it is uncontradicted that Mrs. Spallato had kidney damage such that 80 to 90 per cent of her kidney function was destroyed. This is far from indicating diabetes that was under good control.

Moreover, she had previously sustained a myocardial infarct that antedated by many months the swine flu injection, and the cause of which is unknown but which certainly could have been related to her diabetes.

There was an eye problem that indicated advanced diabetic damage.

Mrs. Spallato was testing her urine rather than her blood to determine what her blood sugar was. I believe the evidence indicates that that is a relatively primative way of testing the level of blood sugar. Blood testing is a far more precise way of measuring, and we

have no evidence that I know of as to what Mrs. Spallato's blood level was during the period prior to her death. What we do know is that when she entered the hospital she had a very high blood sugar reading, and her diabetes was deemed at that time to be out of control.

Therefore, to discount diabetes as a cause of death when it is clear that Mrs. Spallato had a serious diabetic condition and when it is known that diabetes and heart trouble of the kind which was the immediate cause of her death are closely related on a causal basis seems to me to be scientifically unsupportable.

I find on what I regard as the overwhelming weight of the evidence that the cause of Mrs. Spallato's death was a myocardial infarct, which was a complication of her diabetes and was unrelated to the swine flu injection.

Accordingly, I find the issues in favor of the defendant and against the plaintiff and enter judgment in favor of the defendant.

We will take a five-minute recess before the next case.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)